Supreme Court, U.S.
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No. 03-04 98

IN THE

Supreme Court of the United States

SNAKE RIVER VALLEY ELECTRIC ASSOCIATION,
Petitioner,

v.

PACIFICORP,
(INCLUDING UTAH POWER & LIGHT COMPANY, A DIVISION),
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), the adjudication of the Sherman Act (15 U.S.C. § 1, *et seq.*) under the federal antitrust laws by the district court requires, as a condition precedent, the filing by the party seeking antitrust relief of an application for wheeling with the Federal Energy Regulatory Commission under the Federal Power Act.

2. Whether, under *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980), *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992), and *Patrick v. Burgett*, 586 U.S. 94, 101 (1988), the provisions of the Sherman Act of the federal antitrust laws are superseded under the state action immunity doctrine where the State has never held any hearing or made any adjudication to "exercise ultimate control over the challenged [private] anticompetitive conduct."

3. Whether, under *New York, et al. v. Federal Energy Regulatory Commission*, 535 U.S. 1 (2002) and *Public Utilities Com. v. Attleboro Steam & E. Co.*, 273 U.S. 83, 89-90 (1927), the state statute relied on by the courts below to provide antitrust immunity, the Idaho State Electric Supplier Stabilization Act of December 8, 2000, conflicted with the bright, clear line drawn by the Commerce Clause of the Constitution establishing that the states lack jurisdiction to adjudicate wheeling of wholesale power.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rules 14.1, petitioner states that all parties to the proceeding in the court whose judgment is sought to be reviewed are included in the caption, except the State of Idaho, intervenor therein.

Pursuant to Supreme Court Rule 29.6, petitioner states that PacifiCorp is a public utility operating in interstate commerce and is wholly owned by Scottish Power, a British-owned company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT REQUIRED BY RULES 14.1 AND 29.6	ii
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	8
I. THE COURTS BELOW ERRED IN RULING THAT SNAKE RIVER HAD TO FILE A REQUEST FOR WHEELING WITH THE FEDERAL ENERGY REGULATORY COMMISSION UNDER THE FEDERAL POWER ACT AS A CONDITION PRECEDENT TO ANY RELIEF UNDER THE FEDERAL ANTITRUST LAWS, CONTRARY TO THIS COURT'S LONG-ESTABLISHED DECISION IN *OTTER TAIL POWER CO. V. UNITED STATES*	9
II. THE COURTS BELOW ERRED IN RULING THAT THE AMENDED ESSA AUTOMATICALLY SUPERSEDED THE FEDERAL ANTITRUST LAWS, CONTRARY TO THIS COURT'S DECISIONS IN *MIDCAL, TICOR*, AND *BURGETT*	13

TABLE OF CONTENTS—Continued

Page

III. THE AMENDED ESSA CAN PROVIDE NO IMMUNITY FROM THE FEDERAL ANTI-TRUST LAWS BECAUSE THE STATE LACKS JURISDICTION TO ADJUDICATE WHEELING OF WHOLESALE POWER UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION 15

CONCLUSION 17

TABLE OF AUTHORITIES

CASES — Page

California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980) ..... *passim*
Federal Power Commission v. Southern California Edison Company, 376 U.S. 205 (1964) .. 16
Ftc v. Ticor Title Ins. Co., 504 U.S. 621, 634 (1992) ..... *passim*
New York, Et Al. v. Federal Energy Regulatory Commission, 535 U.S. 1 (2002) 9, 10, 16
Nugget Hydroelectric, L.P. v. Pacific Gas & Electric Co., 981 F.2d 429 (9th Cir. 1992) 14
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) ..... *passim*
Patrick v. Burgett, 586 U.S. 94 (1988) ..... *passim*
Public Utilities Com. v. Attleboro Steam & E. Co., 273 U.S. 83 (1927) 15
Snake River Valley Electric Association v. Pacificorp, 238 F.3d 1189 (9th Cir. 2001) ("*Snake River I*") ..... *passim*
Snake River Valley Electric Association v. Pacificorp, 357 F.3d 1042 (9th Cir. 2004) ("*Snake River II*"), *pet. for reh'g en banc denied* 1, 8, 11, 12
Transmission Access Policy Study Group v. Ferc, 225 F.3d 667 (D.C. Cir. 2000) 16
United States v. Griffith, 334 U.S. 100 12

STATUTES

15 U.S.C. §§ 15, 26, Clayton Act 2
15 U.S.C. § 1, *et seq.* 2, 6
15 U.S.C. § 14, Section 3 of the Clayton Act 2
Energy Policy Act of 1992, 16 U.S.C. § 824k(e) .. 16
Electric Supplier Stabilization Act of 1970, Idaho Code 61-332D ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Electric Supplier Stabilization Act, amended December 8, 2000, Idaho Code 61-332D ..... *passim*
Order 888-A, CCH FERC Stats. And Regs. ¶ 31048 16
U.S. Const., art. I, § 8, cl. 3 ..... *passim*

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v.

PACIFICORP,
(INCLUDING UTAH POWER & LIGHT COMPANY, A DIVISION),
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Snake River Valley Electric Association, an electric cooperative, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit below, *Snake River Valley Electric Association v. PacifiCorp* ("*Snake River II*"), is published at 357 F.3d 1042 (9th Cir. 2004), *pet. for reh'g en banc denied*, and is reproduced in the Petition Appendix A ("Pet. App.") at 1a-20a. The order of the district court of February 7, 2002 is

reproduced at Appendix B, Pet. App. 21a-28a. The order of the Ninth Circuit denying rehearing is reproduced at Pet. App. C at 29a. An earlier opinion of the Ninth Circuit, *Snake River Valley Electric Association v. PacifiCorp* ("*Snake River I*"), denying antitrust immunity for PacifiCorp, is published at 238 F.3d 1189 (9th Cir. 2001).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 9, 2004 and Snake River's petition for rehearing was denied on April 2, 2004. This Court has jurisdiction in this case under 28 U.S.C. § 1254.

RELEVANT STATUTORY PROVISIONS

This petition involves (a) a claim by the petitioner under the federal antitrust laws (15 U.S.C. §§ 15, 26), commonly known as the Clayton Act, in order to obtain injunctive relief requiring the wheeling of wholesale power and to provide compensation to the petitioner for past and continuing violation by the defendant under §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2), and Section 3 of the Clayton Act, 15 U.S.C. § 14. The pertinent text of these provisions is set forth in Pet. App. D at 30a-30b.

STATEMENT OF THE CASE

The petitioner, Snake River Valley Electric Association ("Snake River" or "SRVEA"), filed its complaint on July 17, 1996 against respondent PacifiCorp under the federal antitrust laws for PacifiCorp's refusal to wheel (deliver) or sell wholesale power to Snake River. Snake River formed its electric cooperative in 1993, after extensive studies and investigations commencing in 1989, on behalf of a number of irrigation farmers and other interested members located in a rural unincorporated area in eastern Idaho served by PacifiCorp, almost surrounded by other cooperatives.

Over a three-year period from 1993-1996, Snake River made numerous requests to PacifiCorp seeking purchase of wholesale power and/or wheeling of power over its essential transmission system from another supplier (Idaho Power Co.), which were consistently denied by PacifiCorp. Snake River subsequently filed the complaint in this case on July 17, 1996. On August 7, 1996, PacifiCorp moved to dismiss Snake River's complaint, contending that it could not be ordered to wheel under the federal antitrust laws because of state action immunity, based on the Idaho Electric Supplier Stabilization Act enacted in 1970 ("Original ESSA").

The district court initially denied PacifiCorp's motion to dismiss on April 20, 1997. In 1997, after Idaho Power Co.'s offer to sell power had expired because PacifiCorp had refused to wheel, Snake River entered a five-year contract to purchase wholesale electric power from Enron Power Marketing, and sought a preliminary injunction to require PacifiCorp to wheel the wholesale power to it to avoid the loss of that contract. At the hearing on the preliminary injunction, PacifiCorp, to avoid a finding of irreparable injury for its then-admitted refusal to wheel, stipulated in open court that it would provide wholesale electricity to Snake River under the same terms and conditions as those in the Enron contract, if so required under the antitrust laws. The district court, based on this stipulation, denied the preliminary injunction that could have gotten Snake River into operation.

Subsequently, in 1998, the State of Idaho intervened and filed a motion for summary judgment, claiming antitrust immunity for PacifiCorp based on the Original ESSA. The district court then reversed its initial decision and granted the State's motion. Snake River appealed this decision to the Ninth Circuit Court of Appeals on February 19, 1999.

That court issued its opinion reversing the decision of the district court, holding that the utility was not shielded by state action immunity, and remanded the case. *Snake River Valley*

Electric Association v. PacifiCorp, 238 F.3d 1189, 1195 (9th Cir. 2001) ("*Snake River I*"). The Ninth Circuit in *Snake River I* held the second prong of the *Midcal* test:

> . . . requires that the state "*exercise ultimate control over the challenged [private] anticompetitive conduct.*" *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 . . .

238 F.3d at 1193; emphasis added. The Ninth Circuit in *Snake River I* ruled that:

> . . . *This prong ensures that "the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." Patrick v. Burgett*, 486 U.S. 94, 101. . . (1988).

Id.; emphasis added.

In the remand proceedings before the district court from the initial decision of the Ninth Circuit in *Snake River I*, the district court made a number of rulings enabling PacifiCorp to defeat that decision: (1) it ruled that Snake River had to file an application with the Federal Energy Regulatory Commission for wheeling of its alternate low-cost power supply from Idaho Power Company and Enron Power Marketing as a condition precedent to obtaining antitrust relief; (2) it excluded evidence of PacifiCorp's refusal to sell wholesale power to Snake River for three years starting in 1993, and evidence of PacifiCorp's open-court stipulation in 1997 at the preliminary injunction hearing, supporting its refusal to wheel power to Snake River; (3) it ruled that an amendment to the ESSA enacted by the Idaho Legislature on December 8, 2000 ("Amended ESSA") automatically gave PacifiCorp state action immunity as of that date, barring any injunctive relief under the federal antitrust laws that would enable Snake River ever to become an operating cooperative, regardless of antitrust violations by PacifiCorp prior to that date, or any damages subsequent thereto, even though there had been no

action by any state agency under the Amended ESSA determining the merits of these issues required by the new legislation;[1] and (4) it denied Snake River's claim that the State lacked jurisdiction under the Commerce Clause of the U.S. Constitution to adjudicate matters under the Amended ESSA involving the wheeling and sale of wholesale power in interstate commerce.

After eight days of trial, the court instructed the jury and gave the jury a verdict form listing seven questions. The first three of these provided as follows:

> Question 1. Were PacifiCorp's power lines that served SRVEA's potential customers essential to effective competition in the market for electrical power in that area of southeastern Idaho? Yes or No.
>
> Question 2. Was it impractical or uneconomical for SRVEA to construct their own facilities to serve their potential customers? Answer: Yes or No.
>
> Question 3 reads: Did PacifiCorp deny a request by SRVEA that it be provided access to PacifiCorp's power lines? Answer: Yes or No.

The jury returned a verdict answering Yes to Questions 1 and 2, but No to Question 3. The court had advised if they answered No to any of the initial questions, they need not proceed to the next question.

During the trial, PacifiCorp presented evidence over petitioner's objection that prior to filing its complaint, Snake River had never filed an application with the Federal Energy Regulatory Commission for wheeling of its wholesale power supply, obtained first from Idaho Power Company and later from Enron Power Marketing, and that this barred Snake River from any remedy under the federal antitrust laws for PacifiCorp's refusal to wheel.

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[1] There has been no such determination even to the present time.

The district court allowed PacifiCorp to quote regulations issued by the Federal Energy Regulatory Commission pertaining to applications for power service as applicable to the facts of this case. The court in its instructions to the jury ruled that "at times during the trial, the attorneys have referred to the Code of Federal Regulations, or C.F.R. These regulations have the force of law and may be quoted by the attorneys in their arguments."[2]

Also, before the trial, the district court had granted PacifiCorp's motion for summary judgment as to all claims under Section 2 of the Sherman Act that "PacifiCorp refused to sell electrical power to Snake River," Pet App.28a, while the district court conceded that there was ample evidence that PacifiCorp had monopoly power over transmission. It also granted PacifiCorp's motion *in limine* to exclude Snake River's evidence showing that for three years prior to filing the complaint in July 1996, PacifiCorp had consistently refused to sell any wholesale power to Snake River.

The courts below on remand also held that the amendment by the Idaho Legislature of the Original ESSA on December 8, 2000 barred Snake River from any antitrust

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[2] Counsel for PacifiCorp heavily stressed this ruling to the jury:

> The judge has told you in his instructions, . . . that the Code of Federal Regulations has the force of law and, of course, should be treated by you as such. And there are FERC regulations that govern requests for transmission services and they are specific and they are clear. Let's just look at 18 C.F.R. 2.20. . . the components of a good-faith request. . . for transmission services. . . . What's the second thing you have to include in your request? "A statement that the party requesting transmission is or will be upon commencement of the service an entity eligible to request transmission under Sections 211 and 213 of the Federal Power Act." . . . A statement that the request for transmission services is intended to satisfy the request for transmission services requirement under the Federal Power Act. . .

injunctive relief.[3] Pet. App. 10a. After the Original ESSA had been amended, PacifiCorp filed a petition with the Idaho Public Utilities Commission ("IPUC") pursuant to the newly amended 61-332D, seeking an order determining that PacifiCorp shall not be required to provide such wheeling service.

In the proceedings before the IPUC, the Commission rejected any summary judgment for PacifiCorp against Snake River under the new Amended ESSA because of genuine issues of disputed fact. Despite this, the district court, in a decision of February 7, 2002 before the trial, ruled that the Amended ESSA "immunized PacifiCorp from SRVEA's claims for refusal to wheel after December 8, 2000, the date ESSA was amended." Pet. App. 28a. The district court instructed the jury as a matter of law that the Amended ESSA barred Snake River under the federal antitrust laws to any injunction requiring PacifiCorp to wheel power for its cooperative system at any time, and that Snake River was limited to any damages for violation of the federal antitrust laws for the period ending December 8, 2000. PacifiCorp strongly argued this to the jury during the trial:

Damages is all this case is about. This case is not about Snake River Valley Electric Association going into business

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[3] The Amended ESSA provided as follows:

Idaho Code 61-332D. WHEELING SERVICES.

(1) An electric supplier shall not be required to provide wheeling service over its system if such service results in retail wheeling and/or a sham wholesale transaction.

(2) An electric supplier declining to furnish wheeling service pursuant to this Section shall petition the Commission for a review of the electric supplier's action in respect to a request for such service. The Commission shall, upon notice and opportunity for a hearing, review the electric supplier's action for consistency with the purposes and provisions of this Act, and issue an order in accordance with its finding, ordering either that the wheeling service shall, or shall not, be required.

and serving any customers in the Idaho Falls area. The Idaho Legislature has now spoken on that subject. This court has ruled as a matter of law...they are not entitled under the existing laws to take over PacifiCorp's customers. That's not part of this case.

This denial of any injunctive relief under the federal antitrust laws for Snake River to become established as a viable cooperative had a negative impact on the entire case. At no time, however, has any state regulatory agency or authority issued any ruling under the Amended ESSA that Snake River's request to PacifiCorp for wheeling service "results in retail wheeling and/or a sham wholesale transaction."

In addition, the district court below denied Snake River's claim that the Amended ESSA of December 8, 2000 exceeded the state's authority under the Commerce Clause of the Constitution. It rejected Snake River's contention that a clear, bright line had been drawn between federal and state jurisdiction over wholesale sales of electricity in interstate commerce, which excluded the states from any jurisdiction over the wheeling of the wholesale power sought by Snake River.

The second decision of the Ninth Circuit Court of Appeals below, *Snake River Valley Electric Association v. PacifiCorp*, 357 F. 3d 1042 (9th Cir. 2004) ("*Snake River II*"), confirmed the rulings by the district court on these issues. Pet. App. 1a-20a.

REASONS FOR GRANTING THE PETITION

This petition presents an important case of denial of the applicability of the federal antitrust laws, long confirmed by decisions of this Court, to Snake River on three major issues:

(1) The decisions below are in direct contravention of this Court's decision in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) ruling that the Federal

Power Commission has no authority to adjudicate the federal antitrust laws;

(2) The decisions below conflict with decisions by this Court as to the criteria required for applicability of the state action immunity doctrine in *California Retail Liquor Dealers v. Midcal Aluminum Inc.*, 445 U.S. 97 (1980), *Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992), and *Patrick v. Burgett*, 486 U.S. 94, 101 (1998), denying any state action immunity where the state, as here, has not actively supervised the details of the specific antitrust conduct at issue; and

(3) The decisions below, by upholding state action immunity based on the December 8, 2000 amendment to the ESSA by the Idaho Legislature—which sought to vest the state public utilities commission with the jurisdiction to determine whether the wholesale wheeling sought by Snake River was "a sham wholesale transaction"—conflict with the clear, bright line confirmed by this Court in many cases, most recently *New York, et al. v. FERC, et al.*, 535 U.S. 1, 8-9 n.6 (2002), establishing that the states lack constitutional authority to control wholesale power in interstate commerce.

I. THE COURTS BELOW ERRED IN RULING THAT SNAKE RIVER HAD TO FILE A REQUEST FOR WHEELING WITH THE FEDERAL ENERGY REGULATORY COMMISSION UNDER THE FEDERAL POWER ACT AS A CONDITION PRECEDENT TO ANY RELIEF UNDER THE FEDERAL ANTITRUST LAWS, CONTRARY TO THIS COURT'S LONG-ESTABLISHED DECISION IN *OTTER TAIL POWER CO. V. UNITED STATES.*

In *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), this Court definitively rejected the contention by a utility (Otter Tail, comparable to PacifiCorp) that the Federal

Power Act immunizes utilities from the federal antitrust laws with respect to a refusal to wheel or sell electric power for a competitor (new municipal systems comparable to Snake River, a cooperative). In that case, the utility argued that the Federal Power Commission (now named the Federal Energy Regulatory Commission) under its regulations governed the wheeling of power, and therefore the utility should be immune from the antitrust laws. This Court held to the contrary; that:

> There is nothing in the legislative history which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest. . .

410 U.S. at 373-374. The Court then held that:

> It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships. When these relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws.
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> * * *
>
> Thus, there is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for or immunize Otter Tail from antitrust regulation for refusing to deal with municipal corporations.

410 U.S. at 374-375.

This Court has recently unanimously confirmed the *Otter Tail* decision in *New York, et al. v. Federal Energy*

Regulatory Commission, et al., 535 U.S. 1, 8-9 n.6 (2002). The Court confirmed that *Otter Tail* permitted "antitrust remedies against a utility company which, among other things, refused to sell power at wholesale to some municipalities."

Also, the ruling by the district court below and the Ninth Circuit's affirmance (in *Snake River II*), excluding evidence of PacifiCorp's longstanding refusal to deal with Snake River by refusing to sell wholesale power, improperly denied Snake River's rights under the federal antitrust laws. The district court granted PacifiCorp's motion *in limine* to bar any evidence relating to PacifiCorp's refusal to sell wholesale power to Snake River (commencing in 1993, three years before the complaint was filed). Pet. App. 28a. The decision below by the Ninth Circuit (*Snake River II*) affirming PacifiCorp's claim that it had not "refused to deal" by refusing to sell wholesale power to Snake River, Pet. App. 15a-16a, conflicts with *Otter Tail*. There, this Court upheld a decree that enjoined Otter Tail Power Company:

> . . . from refusing to sell electric power at wholesale to existing or proposed municipal electric systems in the areas serviced by Otter Tail...or from entering into or enforcing any contract which limits the customers to whom, and areas in which, Otter Tail or any other electric power companies may sell electric power.

410 U.S. at 368-69.[4]

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[4] This Court affirmed a district court decision that found:

> Here, Otter Tail refuses to sell power to municipalities which would thereby take retail power business from Defendant. . . .Because of its dominant position, Otter Tail is able to deprive towns of the benefits of competition, which would result from municipally-owned facilities.

United States v. Otter Tail Power Co., 331 F. Supp. 54, 61 (1971).

This Court's ruling is clear that a refusal to sell power by a utility which has monopoly power is a relevant factor to evaluate in determining an antitrust violation:

> . . . The record makes abundantly clear that Otter Tail used its *monopoly power* in the cities in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitor, all in violation of the antitrust laws. *See United States v. Griffith*, 334 U.S. 100, 107. . . .The District Court determined that Otter Tail has a *"strategic dominance in the transmission of power in most of its service area" and that it uses dominance to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply.*
>
> * * *
>
> . . . There were no engineering factors that prevented Otter Tail *from selling power at wholesale to those towns that wanted municipal plants*. . . the District Court found—and its findings are supported—that Otter Tail's refusal to sell at wholesale...[was] solely to prevent municipal power systems from eroding its monopolistic position.

410 U.S. 377, 378; emphasis added. Thus, the ruling by the district court and the Ninth Circuit below in *Snake River II* that evidence as to PacifiCorp's refusal to sell power to Snake River should be excluded directly conflicts with this Court's controlling decision in *Otter Tail*. Similar conclusions exist as to the exclusion of any evidence of the 1997 PacifiCorp stipulation to the Ninth Circuit in open court, which would have demonstrated clearly that PacifiCorp was indeed refusing to wheel power to Snake River.

II. THE COURTS BELOW ERRED IN RULING THAT THE AMENDED ESSA AUTOMATICALLY SUPERSEDED THE FEDERAL ANTITRUST LAWS, CONTRARY TO THIS COURT'S DECI-SIONS IN MIDCAL, TICOR, AND BURGETT.

The district court and court of appeals erred in terminating any remedies under the federal antitrust laws for Snake River as of December 8, 2000, based on an amendment to the ESSA by the Idaho Legislature as of that date.

Both of the courts below ruled that the Amended ESSA gave PacifiCorp permanent immunity from any injunctive relief under the federal antitrust laws to order it to wheel to Snake River at any time, and limited damages only to December 8, 2000. Pet. App. 21a, 8a-14a. The decision by the district court, which was communicated to the jury and consistently elaborated on by PacifiCorp throughout the trial, directly conflicted with the earlier decision of the Ninth Circuit based on decisions by this Court, and unlawfully precluded Snake River from obtaining any remedies under the federal antitrust laws, as ruled in *Snake River I.*

The Ninth Circuit in *Snake River I* held that PacifiCorp, under the Original ESSA, has no immunity from the federal antitrust laws because the ESSA was not self-policing tosatisfy the second prong of *Midcal*. The Ninth Circuit held that the second prong of the *Midcal* test:

> . . . requires that the state *"exercise ultimate control over the challenged [private] anticompetitive conduct." FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 . . .

238 F.3d at 1193; emphasis added. The Ninth Circuit in *Snake River I* ruled that:

> . . . *This prong ensures that "the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually*

> *further state regulatory policies." Patrick v. Burgett*, 486 U.S. 94, 101. . . (1988).

Id.; emphasis added.[5]

Of the changes enacted by the Amended ESSA on December 8, 2000, authorizing the Idaho Public Utilities Commission ("IPUC") to adjudicate certain issues, PacifiCorp has filed only for an adjudication under the new Section 61-332D. *See* fn.3, p. 6, *supra*. That Section states that an electric supplier shall not be required to supply wheeling service over its system if such service results in "retail wheeling and/or a sham wholesale transaction" and requires an electric supplier declining to supply electric service pursuant to the Section to petition the state Commission for review of the electric supplier's action. The Commission is, in turn, required under the amended ESSA to review the electric supplier's action for consistency with the purposes and provisions of ESSA, and issue an order in accordance with its findings, ordering "either that the wheeling service shall, or shall not, be required." *Id.*

The IPUC in an order issued October 30, 2001, denied PacifiCorp's request for summary judgment that Snake River was seeking wheeling from it for a "sham wholesale transaction" and scheduled discovery, testimony and a

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[5] In *Snake River I*, the Ninth Circuit also denied the claim by PacifiCorp and the State of Idaho that the four Idaho cases applying and enforcing the Original ESSA amount to active supervision under the Ninth Circuit's decision in *Nugget Hydroelectric, L.P. v. Pacific Gas and Electric Co.*, 981 F.2d 429 (9th Cir. 1992), ruling as follows:

> . . . While *Nugget* does hold that an equivalent number of cases act as active supervision. . . *those cases all involved reviews of the specific conduct at issue in Nugget*. . . the mere presence of cases reviewing general violations of the ESSA does not amount to active supervision in this case. . .

238 F.3d at 1195; emphasis added. There has been no such review by the Idaho PUC under the Amended ESSA.

hearing on the issue. However, after the district court's decision granting antitrust immunity to PacifiCorp effective December 8, 2000, Pet. App. 21a-24a, 28a, the IPUC took no further action in its proceeding.

Under the controlling decisions by this Court in *California Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104, (1980), *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992), and *Patrick v. Burgett*, 486 U.S. 94 (1998), PacifiCorp has not met the *Midcal* active supervision requirement because the State has not "exercised sufficient independent judgment and control so that the details of [the final results] have been established as a product of deliberate state intervention," citing *Ticor* 238 F.3d at 1194.

III. THE AMENDED ESSA CAN PROVIDE NO IMMUNITY FROM THE FEDERAL ANTITRUST LAWS BECAUSE THE STATE LACKS JURISDICTION TO ADJUDICATE WHEELING OF WHOLESALE POWER UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION.

This Court has held in a number of cases that the states have no authority under the Commerce Clause of the U.S. Constitution to regulate wholesale sales of electric power in interstate commerce.[6] *Public Utilities Com. v. Attleboro Steam & E. Co.*, 273 U.S. 83, 89-90 (1927) rules that:

> Plainly, however, the paramount interest in the interstate business carried on between two companies is not local to either state but is essentially national in character. The [wholesale rate] is therefore not subject to regulation by either of the two states in the guise of protection to their respective local interests, but, if such regulation is

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[6] The wheeling of wholesale power involved in the present case is clear. *Snake River I*, 238 F.3d at 1191.

> required, it can only be obtained by the exercise of the power vested in Congress.

These precedents by the Supreme Court under the Commerce Clause resulted in the enactment of the Federal Power Act in 1935. This Court in *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 215-216 (1964) confirmed that the states had no jurisdiction over the sales and transportation of wholesale power in interstate commerce in the United States ("Congress meant to draw a bright line easily ascertained between state and federal jurisdictions. . . "). Since the enactment of the Federal Power Act in 1935, the Commission has ruled in innumerable cases, affirmed by the federal courts, that the States have no jurisdiction to regulate the wheeling of wholesale power for resale.

The Federal Energy Regulatory Commission, in issuing Order 888 in 1996 relating to the transmission of electric power at wholesale in interstate commerce, has ruled that the issue of any "retail-turned-wholesale" or "sham wholesale transactions" fall exclusively within federal jurisdiction. Order 888-A, CCH FERC Stats. and Regs. ¶ 31048 at 30402. The U.S. Court of Appeals for the D.C. Circuit affirmed the Commission's order. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 723-724 (D.C. Cir. 2000), which this Court has affirmed in *New York, et al. v. Federal Energy Regulatory Commission, et al.*, 535 U.S. 1 (2002).

Congress, in enacting the Energy Policy Act of 1992 to amend the Federal Power Act, expressly provided that nothing therein should amend the federal antitrust laws. 16 U.S.C. § 824k(e), Pet. App. 30a.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment below summarily reversed, or the case set for argument.

Respectfully submitted,

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